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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 658

ANTOINETTE K. BROWN, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The first opinion of the Board of Tax Appeals (R. 4–8) is reported at 42 B. T. A. 693. The first opinion of the Circuit Court of Appeals (R. 9–16) is reported at 122 F. (2d) 800. The second opinion of the Board of Tax Appeals (R. 32–35) is reported at 46 B. T. A. 782. The second opinion of the Circuit Court of Appeals (R. 47–50) is reported at 131 F. (2d) 640.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 20, 1942 (R. 50). The petition for a writ of certiorari was filed January

18, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Taxpayer conveyed securities to trustees to pay the income to named beneficiaries during her life and upon her death to pay the principal to her estate. She reserved the right to alter the distribution of the income among the beneficiaries and to change the beneficiaries at any time. She also reserved the right to remove the trustee at any time with or without cause, naming any new trustee she wished, and to designate at any time new remaindermen. Is the income of the trust taxable to the settlor?

STATUTE INVOLVED

Revenue Act of 1934, c. 277, 48 Stat. 680:

> SEC. 22. GROSS INCOME.
>
> (a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

STATEMENT

On January 1, 1927, the taxpayer, who was then a married woman more than sixty years old (R. 19) transferred certain securities to her brother in trust during her life, to pay thirty-five dollars a month of the income to a retired servant and the remainder to Josephine Ballard, a friend. Upon the taxpayer's death, the corpus was to be paid to her executors and administrators in their representative capacity. (R. 36, 38–46.) The trust was established for the purpose of providing support for Miss Ballard, who had come from a well-to-do family which had lost its money and who had been the taxpayer's lifelong friend (R. 20–21).

By the terms of the trust instrument, taxpayer reserved the right to increase the principal, to dispose of the income as she should see fit by altering its distribution among the beneficiaries or by designating new beneficiaries, except that taxpayer was not entitled to direct that the income be paid or applied to her use or benefit; to direct how the principal should be distributed upon her death; and to remove the trustee, with or without cause, and designate any new trustee, including herself. All these powers could be exercised at any time and from time to time. (R. 38–46.)

In 1936, after the close of the taxable year involved, taxpayer appointed her husband trustee in place of her brother, and in 1938, upon the death of Miss Ballard, named her husband as principal beneficiary of the income (R. 21–22).

The income of the trust for the taxable year 1935 was distributed in accordance with its terms but was not reported by taxpayer in her income tax return (R. 36–37). The Commissioner determined a deficiency, explaining that the income was taxable to the settlor under Sections 166 and 167 of the Revenue Act of 1934 (R. 6). Before the Board of Tax Appeals the Commissioner also contended that the income of the trust was taxable to the settlor under Section 22 (a) (R. 8). The Board of Tax Appeals held that the income was not taxable to the settlor (R. 4–8).

On appeal the Circuit Court of Appeals for the Third Circuit sustained the Board's decision as to Sections 166 and 167 but reversed as to Section 22 (a) and remanded the cause for additional evidence (R. 9–16). At the subsequent hearing before the Board of Tax Appeals, taxpayer's husband testified concerning the circumstances under which the trust was established and explained the relationship between the parties involved, as outlined above (R. 16–26). The Board, considering itself bound by the prior decision of the circuit court of appeals, held the income of the trust to be taxable to the settlor under Section 22 (a) (R. 32–35). On appeal the circuit court of appeals affirmed (R. 47–50).[1]

[1] Since the court below in its first opinion held Sections 166 and 167 inapplicable no question concerning them is raised by the petition. Should the petition be granted, however, we shall urge their applicability as an alternative ground supporting the decision upholding the tax.

ARGUMENT

The circuit court of appeals held that the taxpayer retained such a measure of control over the principal and income of the trust that, for reasons explained in *Helvering* v. *Clifford,* 309 U. S. 331, she was to be regarded as the owner of the property, and the income therefrom was to be attributed to her under Section 22 (a). See also, *Helvering* v. *Horst,* 311 U. S. 112; *Helvering* v. *Eubank,* 311 U. S. 122; *Harrison* v. *Schaffner,* 312 U. S. 579.

This decision is plainly correct. Taxpayer surrendered only the powers to dispose of the principal during her lifetime and to direct the payment of income to herself. In her situation, those incidents of ownership can hardly have been a matter of consequence; she was over sixty, married, and (apparently) financially secure. She retained all the incidents of ownership which were a matter of concern—the ultimate power of management and investment through her right to appoint new trustees at any time, the enjoyment of the income not only through the support of her lifelong friend but also through her right to name any new or different beneficiaries, including her husband, whenever she desired, and the substantial control of the principal through her power to control both the disposition of the income during her life and the distribution of the principal upon her death. Consequently, the instant case is well within *Helvering* v. *Clifford, supra,* and is quite unlike the

trust involved in *Helvering* v. *Stuart*, No. 48, this Term, decided November 16, 1942, by which no such measure of control was retained.

Moreover, there is no occasion for further review. Since the decision in the *Clifford* case, the principles invoked by the court below have been well settled; and the court's application of them to the facts of instant case is in accordance with the views of other circuit courts of appeals. See *Commissioner* v. *Buck*, 120 F. (2d) 775 (C. C. A. 2), approved in *Commissioner* v. *Bateman*, 127 F. (2d) 266 (C. A. A. 1); *Commissioner* v. *Wilson*, 125 F. (2d) 307 (C. C. A. 7); *Commissioner* v. *Betts*, 123 F. (2d) 534 (C. C. A. 7).

Although taxpayer does not contend that the ultimate conclusion that the income was taxable to her raises any substantial question or is in conflict with any other decision, she does assert that the reasoning of the court below conflicts with *Commissioner* v. *Goulder*, 123 F. (2d) 686 (C. C. A. 6), and *Commissioner* v. *Armour*, 125 F. (2d) 467 (C. C. A. 7) because the court below ruled that it was not bound by the ultimate conclusion of the Board of Tax Appeals. But any statement or inference in *Commissioner* v. *Goulder, supra*, that the ultimate issue is exclusively one of fact must be taken to have been repudiated by the same court in *United States* v. *Anderson*, decided December 2, 1942, 1942 Prentice-Hall, par. 63,095, where it was held that the ultimate conclusion of the Board in cases like

this is subject to review. Likewise, *Commissioner* v. *Armour, supra,* perhaps should be read in connection with *Commissioner* v. *Wilson,* 125 F. (2d) 307 (C. C. A. 7), which was decided by the same court three days before the *Armour* case, and which holds that the ultimate question is a mixed question of law and fact. In *Williamson* v. *Commissioner* (C. C. A. 7), decided December 29, 1942, 1943 Prentice-Hall, par. 62,382, however, the court reiterated the view that the ultimate question is one of fact. The composition of the court was different in each of these three cases and it is apparent that within the Seventh Circuit some confusion exists.

But, in any event, no conflict is raised by the instant case. Unlike the situation in the *Armour* and *Williamson* cases the instant case did not come before the court below on an ultimate finding of fact supported by substantial evidence. When the case was first before it, the evidence had not been directed to Section 22 (a) and the Board of Tax Appeals, treating the question as one of law to be decided upon the available precedents, ruled that the Commissioner had not made a case. This conclusion, moreover, whatever its character, was plainly erroneous upon the stipulated facts, and the circuit court of appeals was entitled to set it aside and to remand the cause with a correct statement of the applicable principles in order that the taxpayer might have an opportunity to introduce

evidence upon the applicability of Section 22 (a). The Board's decision upon the remand that the new evidence did not alter the case was unquestionably correct and the court below properly affirmed.[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1943.

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[2] In *Woolley* v. *Commissioner*, No. 743, October Term, 1941, the petition for certiorari urged the lower court erred in reversing (122 F. (2d) 167 (C. C. A. 2)) a decision of the Board of Tax Appeals holding the income of a trust not taxable to the grantor, because, under the *Clifford* case, the Board's ultimate finding, if supported by substantial evidence, was conclusive on appeal. The petition was denied, 314 U. S. 693.

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